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No. 08-1033

In The
Supreme Court of the United States

5634 EAST HILLBOROUGH AVENUE, INC., *et al.*,
Petitioners,

v.

HILLSBOROUGH COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioners, six sexually oriented businesses, request this Court to review an unpublished, *per curiam* decision of the Eleventh Circuit affirming summary judgment for Respondent Hillsborough County, Florida (the "County") on Petitioners' challenge to three ordinances which regulate negative secondary effects associated with sexually oriented businesses.

The County has regulated sexually oriented businesses for several years. In response to the negative secondary effects of such businesses, changes in case law, and complaints of constituents, the County's Board of Commissioners (the "Board") began the process of updating and replacing its zoning, licensing, and alcohol ordinances in 2005. Over the next several months, the County compiled evidence concerning the negative secondary effects of sexually oriented businesses, investigated the regulations upheld by the courts to minimize those effects, and conducted public workshops to consider the evidence and develop appropriate legislation. As a result, three new ordinances were proposed and considered.

As the district court explained, "[t]wo public hearings were held before the Board prior to their adoption—one on August 2, 2006, and the other on August 16, 2006. Testimony was adduced both for and against the ordinances. The Board also reviewed judicial decisions, secondary effects reports, and affidavits from private investigators." (App. 11a-12a). Additionally, "[b]oth sides presented opinions from expert witnesses." (App. 13a). After the public hearings, the Board unanimously adopted the three

ordinances (the "ordinances") on September 7, 2006. (App. 7a).

Ordinance 06-24 eliminated a special zoning permit requirement for sexually oriented businesses, but did not change where they may be located. (App. 28a-29a). Ordinance 06-25 is a regulatory measure that requires licensing, but allows continued operation from the day of application until completion of judicial review of any adverse licensing decision. It regulates operating hours and "peep show" booth configuration, and forbids nudity and alcohol in sexually oriented businesses. Semi-nude employees (*i.e.*, those in pasties and a G-string) must be on a stage six feet from patrons in a room of at least 1000 square feet, and cannot have physical contact with patrons. (App. 30a-54a).[1] Ordinance 06-26 forbids bikini-clad employees in alcohol-serving "bikini bars" from touching patrons' buttocks, breasts, lap, and groin areas. (App. 55a-63a).

Each of the three ordinances describes its purpose within the body of the ordinance itself. In the cases of Ordinances 06-24 and 06-25, the ordinances explain that their purpose is "to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses in the County." (App. 7a, 29a,

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[1] Petitioners have omitted the text of these regulations from their Appendix, asserting at App. 53a that "[t]he excerpts deleted from this portion of the ordinance are not germane to the questions presented." On the contrary, the County's operational regulations targeting secondary effects are integral to Petitioners' constitutional challenge to the ordinances. Thus, Petitioners' omission of the substantive regulations is inexplicable.

34a). Ordinance 06-26 describes its purpose as "to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment." (App. 7a, 57a).

Within a week of the Board's adoption of the ordinances, the three Petitioners holding liquor licenses filed a lawsuit challenging Ordinance 06-26, the "bikini bar" physical-contact regulation. Approximately three months later, the remaining Petitioners filed a second lawsuit challenging Ordinance 06-24 (the sexually oriented business zoning ordinance) and Ordinance 06-25 (the sexually oriented business licensing and regulatory ordinance). The district court consolidated the two cases. (App. 6a).

At the close of discovery, the County moved for summary judgment. In opposition, Petitioners submitted four *new* expert affidavits which had never before been disclosed despite an expert disclosure deadline that had passed six months earlier. (App. 14a n.18). The County moved to strike the new expert affidavits on the ground that they had not been timely disclosed.

On October 4, 2007, the district court granted the County's motion for summary judgment. (App. 25a). The district court, "out of an abundance of caution," considered Petitioners' new expert affidavits. (App. 14a n.18, 24a). Finding that Petitioners had not created any genuine issue of material fact even with the late

affidavits, the court denied the County's motion to strike the late affidavits as moot. (App. 24a-25a).

In its opinion, the district court carefully reviewed the Ordinances' purpose, findings, and rationale. (App. 7a-11a, 20a-21a). It also summarized some of the key evidence in the undisputed legislative record—evidence demonstrating specific adverse secondary effects of sexually oriented businesses. (App. 11a-14a, 20a-24a). The district court observed that the legislative record contained numerous studies that reported crime and unsanitary conditions associated with sexually oriented businesses. (App. 12a n.13). After citing a number of specific studies included in the record, the district court also found that the record before the Board included "numerous additional studies, expert reports from other cases and testimony from other proceedings which predominantly support the fact that higher crime rates occur in areas where sexually oriented businesses exist." (App. 12a n. 13).

The district court further found that the County not only relied "upon an expert and studies used and approved by other courts, but retained investigators who actually visited similar or the same sexually oriented businesses as the Plaintiffs in this case and found evidence to support criminal conduct, the spread of communicable diseases, and other non-crime related adverse secondary effects." (App. 24a). In conjunction with its discussion of the record evidence, the district court also discussed controlling law from this Court and from the Eleventh Circuit. (App. 14a-20a). Applying that law to the record before it, the district court found that the ordinances do not ban sexually oriented businesses, but merely regulate the time, place, and manner of their operations. (App. 20a).

Finding that the ordinances were enacted to diminish adverse secondary effects, the court ruled that the ordinances were content neutral and subject to intermediate scrutiny. (App. 21a). Significantly, Petitioners did not contest these findings on appeal. (App. 2a).

After considering all of Petitioners' evidence, including their pre-adoption expert reports as well as the affidavits submitted for the first time in opposition to summary judgment, the district court held that the Board reasonably relied on the extensive evidence documenting the problem of adverse secondary effects. (App. 23a-24a). The court further found that Petitioners failed to cast direct doubt on the County's evidence or rationale for its ordinances. (App. 24a-25a).

At the Eleventh Circuit, Petitioners "abandoned on appeal numerous arguments that they either made or could have made in the district court and on appeal." (App. A, pp. 1a, 2a). Their "sole, and narrow, argument on appeal [was that they] adduced sufficient evidence to create genuine issues of fact with respect to whether the county satisfied its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects." (App. 2a). "After oral argument and careful consideration," the Eleventh Circuit "conclude[d] that the County met its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects." (App. 4a). The panel further "conclude[d] that appellants have pointed to no evidence that would create a genuine issue of fact as to whether the County was reasonable in relying on their evidence and their rationale that the ordinances would reduce secondary

effects." (App. 4a). Accordingly, the Eleventh Circuit affirmed the summary judgment entered in favor of the County. (App. 4a).

Petitioners' petition for rehearing and rehearing en banc was denied November 13, 2008. (App. 26a-27a).

REASONS FOR DENYING THE WRIT

The writ should be denied for several reasons. First, both the proposed questions and the petition as a whole are inaccurate, conclusory, and ambiguous. Among other defects, the petition never advises the Court of exactly what point of law should be reviewed or what Petitioners request the Court to do. This alone justifies denial of the writ. SUP. CT. R. 14.4.

Second, the petition should be denied because none of the reasons ordinarily justifying review is present. Under Supreme Court Rule 10, review is typically reserved for cases presenting important questions of federal law that are the subjects of circuit splits, that should be settled by this Court, or that have been resolved below in a manner contrary to this Court's relevant precedents. Despite Petitioners' unsupported statements to the contrary, none of these grounds is present in this case.

Third, the petition should be denied because there is no other compelling reason for review. Petitioners would have this Court believe that lower courts are clamoring for review of *City of Los Angeles v Alameda Books, Inc.*, 535 U.S. 425 (2002). However, a review of the cases cited by Petitioners reveals no such call; indeed, decisions under *Alameda Books* have reached consistent results. Petitioners are simply trying to

obtain review of a straightforward summary judgment decision. Petitioners' conclusory arguments against the ruling below consist, at best, of an alleged misapplication of a properly stated rule of law. This is not a basis for granting certiorari. *See* SUP. CT. R. 10.

I. THE PETITION SHOULD BE DENIED BECAUSE IT IS UNCLEAR.

Supreme Court Rule 14.1(a) requires a petition for a writ of certiorari to contain "[t]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." Later in the same rule, petitioners are instructed to provide a "direct and concise argument amplifying the reasons relied on for allowance of the writ." SUP. CT. R. 14.1(h). "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." SUP. CT. R. 14.4. The Court should deny the petition because it is conclusory, inaccurate, and seriously lacking in clarity.

The Petition presents three questions, but none identifies a particular point of law to be reviewed. Rather, the three roving questions seek review of the entire "opinion of the Eleventh Circuit below," "other judicial decisions throughout the Nation," an alleged "denial of due process," "confusion in the application" of an evidentiary burden-shifting process, and an undefined "differential summary judgment standard." Perhaps the confusion could be excused if the remainder of the petition illuminated the Petitioners' request, but the petition's subsequent argument does not bring the clarity that the questions presented lack.

In fact, the argument exacerbates this confusion by failing to address the three questions separately. The discussion of all three questions is scrambled together without any articulation of whether a particular argument refers to all three questions or just one.

The first question presented concedes that the Eleventh Circuit and "other courts throughout the Nation" have reached similar results in applying *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Petitioners assert that these courts have misinterpreted *Alameda Books*, but Petitioners do not articulate how they have done so. Petitioners apparently request the Court to assume that conclusion, and hold that this undefined misapplication is a denial of due process—even though the decisions below never mention due process.

The second question is similarly unhelpful. Petitioners assume their conclusion—that confusion abounds in the lower courts—but even then, neither the question nor the subsequent argument articulates the exact point of law about which there is confusion. Nor do petitioners ask for *Alameda Books* to be overturned. Instead, Petitioners make a generalized request for review of a prior decision without articulating a concrete need for it.

The third question presented is the most convoluted of all three, mixing obtuse references to the summary judgment standard with First Amendment and due process labels. Again, the subsequent argument sheds no light on the subject.

The petition should be denied because it fails to present a clear and concise question for review.

II. THE PETITION SHOULD BE DENIED BECAUSE NO CIRCUMSTANCES JUSTIFY REVIEW.

A petition for a writ of certiorari will be granted only for compelling reasons, such as when a U.S. court of appeals has decided an important federal question (1) in a way that conflicts with the decision of another U.S. court of appeals or a state court of last resort, (2) that has not been, but should be, settled by this Court, or (3) that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* SUP. CT. R. 10.

Petitioners assert that their petition "satisfies each of the factors identified in Rule 10 that guide this Court's decisions as to whether or not to grant certiorari review." Pet. 10. Of course, Petitioners' statement cannot be true because some factors addressed in Rule 10 apply only to appeals from state courts of highest resort. Even if this obvious misstatement may be excused, Petitioners' assertion demonstrates the carelessness with which Petitioners make completely unsupported assertions. In any event, a closer examination of each claim reveals that no Rule 10 factors are present.

A. There Is No Relevant Split of Authority in the Lower Courts.

Although not clear, it appears that Petitioners' primary argument is that a conflict or split of authority exists among the circuit courts of appeal. Petitioners do not identify any specific statement of law from one circuit that conflicts with a statement of

law from another circuit. Petitioners do quote from a couple of circuit court decisions and a handful of district court decisions, but they never demonstrate a conflict between the quoted language or any other part of the decisions. Instead, the petition relies upon conclusory statements that a conflict exists without ever specifically demonstrating the alleged conflict.

At pages 22 to 26, the petition quotes from six decisions purportedly "showing a split among virtually every level of the judiciary, and specifically among the federal circuit court." Pet. 22. Of those six quoted decisions, however, only two are circuit court decisions. The rest are U.S. district court decisions. Moreover, nothing in the quoted language (or other language within those decisions) reveals a split of authority.

Petitioners' circuit court quotations are from *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 294 (5th Cir. 2003), and *R.V.S., Inc. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004). Nothing within the quoted portions of these decisions, however, reveals any conflict between them or with the decision of the Eleventh Circuit below.

Petitioners also cite a number of circuit court decisions from the Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. Again, however, Petitioners completely fail to identify any specific conflict or split of authority between these decisions. Petitioners merely assert, without support, that these decisions "have essentially ignored the presentation of unassailable evidence casting doubt upon the findings upon which various adult restrictions have been based . . . ." Pet. 21. Significantly, Petitioners do not attack any purported holding or rule of law articulated by any of these

decisions, but instead simply express disagreement with the conclusion that these courts reached as they applied the law. Petitioners' quarrel boils down to Petitioners having a different view of the strength of evidence marshaled by a number of other sexually oriented businesses who challenged ordinances in a variety of other cases. This, however, is a far cry from demonstrating a conflict or split of authority among the circuits.

Petitioners also allege that the Eleventh Circuit decided a significant question of federal law in a manner contrary to decisions of state appellate courts. Pet. 10. Allegedly, the unspecified issues at hand "have both confused and tortured courts at every level of state and federal judiciaries." Pet. 9. At yet another point, the petition references a supposed "monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny . . . ." Pet. 17.

Despite this bombastic rhetoric about a conflict with state court decisions, there is not a single quotation from a state court of last resort in the entire petition. Likewise, the petition does not discuss the substance or holdings of any state court of last resort. Instead, the only references to state courts of last resort in the entire petition are three citations in a string citation in a footnote. Pet. 18 n.4. Again, the petition does not identify any supposed conflict between the decision below and any of these decisions.

Nor does this case involve an important, unsettled question of federal law. Although Petitioners imply that the holding in *Alameda Books* is unclear (leading to widespread, albeit *uniform*, misinterpretation of the

case), the lower court decisions belie this claim. In discerning the holding of *Alameda Books*, the lower courts have consistently applied this Court's rule that when no single opinion commands a majority of the Court, the holding is that opinion that concurs in the judgment on the narrowest grounds. *See, e.g., Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 875 n.20 (11th Cir. 2007) (following *Marks v. United States*, 430 U.S. 188, 193 (1977), to conclude that Justice Kennedy's concurrence constitutes the holding of *Alameda Books*); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 n.1 (8th Cir. 2003) (same); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003) (same). Thus, Petitioners fail to identify any important question of federal law implicated by the Eleventh Circuit's decision that has been left unsettled by this Court.

Petitioners also assert that "[t]he decision of the 11th Circuit . . . is in direct and irreconcilable conflict with decisions of this Court." Pet. 10. As with their other claims, Petitioners never identify a specific alleged conflict. Instead, Petitioners state that "the rejection of 'the rules of evidence' in adult entertainment cases is in direct conflict with this Court's decision in *City of Los Angeles v. Alameda Books*," and that

> The 11th Circuit, in affirming the grant of summary judgment issued by the District Court, incorrectly overlooked this Court's precedent and Eleventh Circuit precedent which allows a full and fair opportunity to evaluate conflicting evidence, in an appropriate evidentiary hearing, relative to the hypothesis

> that adult entertainment businesses create "adverse secondary effects."

Pet. 12.

From these two statements, it appears that Petitioners contend that the "conflict" between the Eleventh Circuit decision and this Court's precedents is that the Eleventh Circuit "rejected the rules of evidence" and refused to allow "an appropriate evidentiary hearing." Petitioners go on to accuse the Eleventh Circuit, through its granting of summary judgment, of "simply ignor[ing] the vast evidence submitted to 'cast doubt' on the County's evidence, and erroneously ignored the challenge to the core methodology, applicability, and quality of the County's evidence." Pet. 14. Petitioners essentially assert that summary judgment is never appropriate in a constitutional case challenging the legislative predicate for regulations. There is no support for this view in this Court's sexually oriented business cases or in any other area of law. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding adult business zoning ordinance constitutional as a matter of law); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997) (rejecting First Amendment challenge and noting that where government has made its required showing, summary judgment is appropriate "regardless of whether the evidence is in conflict").

Petitioners never identify a statement of law from the Eleventh Circuit which conflicts with a statement of law from *Alameda Books* or any other decision from this Court. Instead, Petitioners claim that the Eleventh Circuit erred in granting summary judgment

for reasons Petitioners do not specifically identify. Even if this were true, it would not be a basis for the Court to grant certiorari. SUP. CT. R. 10.

B. There Are No Other Compelling Circumstances Justifying Review.

The second question presented for review is predicated on Petitioners' assertion that several lower court decisions have made "impassioned pleas for this Court to address the inconsistencies and confusion exhibited by the several attempts to apply the *Alameda Books* decision consistently . . . ." Pet. 18 n.4. This claim is false.

Supreme Court Rule 15.2 states that "[c]ounsel are admonished that they have an obligation to the Court to point out . . . perceived misstatements made in the petition." Here, Petitioners' claim of alleged "impassioned pleas" from the lower courts is a misstatement. Petitioners attempt to support the misstatement by citing a dozen lower court decisions, but not a single one of them complains about confusion stemming from *Alameda Books* or entails any "impassioned plea" to address such alleged confusion. Indeed, some of the cited cases were handed down *before Alameda Books* was even decided. *See* Pet. 18 n.4 (citing *Deja Vu of Nashville, Inc. v. Metropolitan Gov. of Nashville and Davidson County, Tenn.*, 274 F.3d 377 (6th Cir. 2001), *cert. den.*, 122 S.Ct. 1952 (2002), and *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85 (Minn. App. 2000), *cert. den.*, 122 S.Ct. 2356 (2002)). Additionally, *none* of these decisions complain about supposed inconsistencies or confusion arising from *Alameda Books*. Tellingly, Petitioners do

not provide a pinpoint citation for any of the twelve cases to support their argument.

In an attempt to obtain review by this Court, the petition consistently mixes lofty rhetoric and key concepts such as splits of authority and conflicts with decisions of this Court. In the final analysis, however, Petitioners never identify a specific statement of law which is allegedly incorrect. Likewise, Petitioners never identify a specific statement of law from one case which conflicts with a rule announced in another case. The claims of confusion and conflict are supported by nothing more than the fact that sexually oriented businesses are sometimes successful and sometimes unsuccessful at summary judgment or at trial. Different results in different cases, however, do not suggest confusion or conflicting views of governing law. Rather, they suggest that courts are properly applying the law to the evidence before them.

That is what the district court and the Eleventh Circuit did in the present case in granting (and affirming) the County's motion for summary judgment. Where, as here, the only "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," the petition for a writ of certiorari should be denied. SUP. CT. R. 10.

CONCLUSION

No factors are present which justify granting the petition. This case does not involve any split of authority between the Eleventh Circuit and another court of appeals or a state court of last resort. Neither does the Eleventh Circuit's decision involve a conflict with an opinion of this Court or an issue of law left

unresolved by this Court. To the contrary, the case involves a straightforward application of governing law to undisputed facts. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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